BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DONALD L. BIBBS	)	
Claimant	)	
v.	)	
	)	Docket No. 1,035,339
PAWNEE MENTAL HEALTH SERVICES	)	
Respondent	)	
and	)	
	)	
COMMERCE & INDUSTRY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent) requests review of the August 17, 2015, Post-Award Medical Award and Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. Claimant appears by counsel, Jeff Cooper. Respondent appears by counsel, John B. Rathmel.

ISSUES

Claimant sustained a work injury on April 29, 2005. In an August 17, 2015, Post-Award Medical Award and Preliminary Hearing Order, the ALJ found claimant is entitled to temporary total disability (TTD) benefits beginning May 8, 2015, and continuing until claimant reaches maximum medical improvement (MMI), not to exceed $100,000.

Respondent requests review of whether claimant can modify his agreed award after the 415 week statute of limitations for review and modification has run. Respondent contends Dr. Grundmeyer, claimant's treating physician, has not shown he based claimant's off work slips on an assessment of claimant's actual job duties with respondent or with his current employer. Respondent argues claimant may seek post-award medical but TTD benefits cannot be awarded following the entry of an award for compensation.

Claimant asserts previous case law holds TTD benefits are not limited by weeks. Claimant contends respondent's issues regarding Dr. Grundmeyer's opinions and post-award TTD benefits were not raised before the ALJ, and cannot be raised for the first time on appeal. Claimant requests the Board affirm the ALJ's Order.

The issues raised for the Board's review are:

1. Is claimant entitled to TTD benefits more than 415 weeks after his accidental injury?

2. Can TTD be ordered with post-award medical benefits?

3. Did the authorized treating physician base his opinions on an assessment of claimant's job duties with respondent?

FINDINGS OF FACT

Claimant alleged a low back injury by accident on April 29, 2005, arising out of and in the course of his employment. On February 4, 2010, claimant settled his claim for a lump sum payment of $17,683.63 on a running award basis based on a 15 percent whole body functional impairment. Claimant had a new job earning more than at the time of the accident, so no work disability was sought. Future medical treatment was left open.

Claimant filed several applications for post award medical, including one on June 5, 2014, requesting authorization of a treatment recommend by Dr. Harris.

On October 15, 2014, the ALJ ordered claimant undergo an independent medical examination (IME) with Dr. Raymond Grundmeyer for for treatment recommendations and to determine whether claimant's condition was related to his accidental injury of April 29, 2005.

On January 27, 2015, claimant saw Dr. Grundmeyer for the IME. In Dr. Grundmeyer's February 13, 2015, report, he found post surgical changes and recommended an L4-5 and L5-S1 laminectomy and foraminotomy related to claimant's previous surgery in 2008. Dr. Grundmeyer reported claimant's condition and need for treatment was directly related to his previous surgery, and his April 29, 2005, work injury was the prevailing factor.

In an April 3, 2015, Post-Award Medical Award, the ALJ awarded claimant medical treatment with Dr. Grundmeyer or another physician to provide treatment recommended in his IME report. The Post-Award Medical Award was not appealed.

On April 27, 2015, claimant underwent the recommended surgery performed by Dr. Grundmeyer. On May 8, 2015, Dr. Grunmeyer gave claimant an off-work slip until a follow-up appointment on June 10, 2015. When claimant returned to see Dr. Grundmeyer on June 10, 2015, he gave claimant another off-work slip until a follow-up appointment scheduled August 7, 2015.

On June 10, 2015, claimant filed an application for preliminary hearing.

At the July 22, 2015, preliminary hearing, claimant requested TTD benefits from April 27, 2015, and continuing. No witness testified. The ALJ stated that in order for the court to have jurisdiction in a post award situation, claimant must file an application for post-award medical. Claimant indicated he would file an application for post-award medical the same day, and did so, requesting TTD and medical treatment. The ALJ gave the parties a week to submit a submission brief.

Respondent's submission letter asserted claimant should not be entitled to TTD because more than 415 weeks had expired since his injury. Respondent argues that once the 415-week benefit period has expired, the award becomes final and not subject to modification. Respondent's submission letter to the ALJ did not assert TTD payments cannot be ordered with post-award medical benefits. Nor did the submission letter argue claimant failed to prove the authorized treating physician, Dr. Grundmeyer, based his opinions on an assessment of claimant's job duties with respondent.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2004 Supp. 44-510k(a) provides:

> At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

K.S.A. 44-534a(a)(1) (Furse 2000) states, in part:

> After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation.

In *Siler,*[1] the Kansas Court of Appeals stated:

> K.S.A. 44–534a(a)(1) provides: "After an application for a hearing ... the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment." A workers compensation final settlement award that leaves open the issue of future medical treatment is not a final settlement on that issue. U.S.D. 512 had the right to question Siler's future medical payments under K.S.A. 44–534a. K.S.A. 44–534a is the only statute that covers disputes regarding future medical treatment. Therefore, the ALJ had jurisdiction to determine whether continued treatment by Dr. Sabapathy was appropriate.
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> K.S.A. 44–534a(a)(2) provides: "Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts." K.S.A. 2010 Supp. 44–551(i)(2)(A) provides that after an ALJ has entered a preliminary order under K.S.A. 44–534a, the Board does not have jurisdiction to review that order unless the ALJ exceeded his or her jurisdiction. Therefore, the Board in this case did not err when it determined that it did not have jurisdiction to review the ALJ's preliminary order. Consequently, this court does not have jurisdiction to review a decision of the Board when the Board did not have jurisdiction.

A preliminary hearing procedure may be used in post-award proceedings. In *Andrews,*[2] the Board held:

> For several reasons the Appeals Board has concluded that the preliminary hearing procedure may be used in the post-award proceeding. First, the above quoted language from K.S.A. 44-534a, as amended by S.B. 649 (1996), was not, in our opinion, intended to limit the use of preliminary hearings. Instead, it was intended to indicate the final award would supersede any preliminary hearing order. Application for review and modification reopens the hearing. Second, policy justifications for preliminary hearings before an award continue to exist after an award. The need for a prompt resolution of issues relating to medical care and temporary total disability benefits may be as urgent after an award as before. Finally, the Act contains at least one example where the legislature expressed the authorized use of a preliminary hearing procedure after an award. K.S.A. 44-556 authorizes the use of preliminary hearing procedures under K.S.A. 44-534a to enforce rights to medical treatment while a case is pending on appeal before the Court of Appeals. Also, K.S.A. 44-551 authorizes use of a preliminary hearing to enforce payment of medical benefits while a case is pending before the Appeals Board.

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[1] See *Siler v. U.S.D. No. 512*, 45 Kan. App. 2d 586, 251 P.3d 92, (2011), *rev. denied* Jan 30, 2012.

[2] *Andrews v. Blackburn, Inc.,* No. 158,135 1996, 1996 WL 463987 (Kan. WCAB July 30, 1996).

In *Hulsey*,[3] Mr. Hulsey filed an application for post-award medical and requested a preliminary hearing where he requested TTD. The ALJ subsequently issued a preliminary hearing order awarding Mr. Hulsey medical treatment and TTD. The State of Kansas appealed. A Board Member dismissed the appeal for lack of jurisdiction, stating:

> The Board has jurisdiction under K.S.A. 2012 Supp. 44-551(i)(2)(A) to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. In addition K.S.A. 2012 Supp. 44-534a (a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. A contention that the ALJ has erred in his finding that the evidence showed medical treatment was necessary to cure and relieve the effects of an injury is not an argument the Board has jurisdiction to consider. K.S.A. 2012 Supp. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation.
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> When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[4] Accordingly, respondent's appeal is dismissed.

An allegation by a party that the ALJ exceeded his or her authority does not automatically grant the Board jurisdiction to review an issue. Pursuant to K.S.A. 44-534a, the ALJ has authority to order TTD. The ALJ followed the precedent of *Cole*[5] and *Jakub,*[6] wherein the Board held TTD is not limited by the 415-week period and is limited only by the dollar limit contained in K.S.A. 44-510f. Claimant filed for a preliminary hearing and proceeded under that procedure. This Board Member finds the Board does not have jurisdiction to review the preliminary hearing order awarding claimant TTD.

Even if the Board had jurisdiction to review the issue of whether claimant is entitled to TTD benefits past the 415 week statute of limitations, the Board would affirm the ALJ's preliminary hearing order. Respondent asserts that once claimant's 415-week benefit period ended on April 12, 2013, claimant is not entitled to receive TTD benefits. In support of its position, respondent cites *Camp*,[7] which held K.S.A. 44-510e(a) is a statute of limitations for seeking review and modification. K.S.A. 44-510e(a) (Furse 2000) in part, states:

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[3] *Hulsey v. State of Kansas,* No. 1,048,616, 2013 WL 4051814 (Kan. WCAB July 15, 2013).

[4] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[5] *Cole v. City of Salina*, No.150,511, 1995 WL 781180 (Kan. WCAB Dec. 15, 1995).

[6] *Jakub v. Boeing Aircraft Company,* No. 186,847, 2004 WL 2579687 (Kan. WCAB Oct. 19, 2004).

[7] *Camp v. Bourbon County,* No. 104,784 , 2012 WL 3135512 (Kansas Court of Appeals unpublished opinion filed July 27, 2012) *rev. denied.* Sept. 4, 2013.

> If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. . . . In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

Claimant relies on *Cole* and *Jakub.* In *Cole,* the Board stated:

> The Appeals Board disagrees with the conclusion that temporary total disability benefits are limited by the 415 weeks. Respondent cites K.S.A. 44-510e (Ensley) in support of its argument for a 415-week limit; however, this section clearly refers to temporary or permanent partial general disability. The only limit on temporary total disability is the dollar limit expressed in K.S.A. 44-510f(a)(2) (Ensley).[8]

In *Jakub,* the Board held:

> The Board has previously held, and continues to hold that TTD compensation, like permanent total disability compensation, is not limited by weeks.[9] Instead, TTD and permanent total disability benefits are capped by a maximum dollar amount. The evidence in this case reflects that claimant has not reached the $100,000 limitation in the applicable version of K.S.A.44-510f.[10]

No subsequent Board or appellate court cases have overturned *Cole* or *Jakub.* As noted in *Cole,*[11] the only limit on TTD is expressed in K.S.A. 44-510f(a)(2)(Ensley), which states:

> For temporary total disability, including any prior permanent total, permanent partial or temporary partial disability payments paid or due, seventy-five thousand dollars ($75,000) for an injury or any aggravation thereof.

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[8] *Cole v. City of Salina*, No.150,511, 1995 WL 781180, at *1(Kan. WCAB Dec. 15, 1995).

[9] *Cole v. City of Salina*, No.150,511, 1995 WL 781180 (Kan. WCAB Dec. 15, 1995).

[10] *Jakub v. Boeing Aircraft Company,* No. 186,847, 2004 WL 2579687, at *1(Kan. WCAB Oct. 19, 2004).

[11] *Cole v. City of Salina*, No.150,511, 1995 WL 781180, at *1(Kan. WCAB Dec. 15, 1995).

Respondent misinterprets the language of K.S.A. 44-510e(a) (Furse 2000) that states, "employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks." The plain language of K.S.A. 44-510e(a) limits an injured worker to a total of 415 weeks of TTD. That statute does not contain language limiting TTD to 415 consecutive weeks or to the first 415 weeks after a claimant's accident.

Moreover, K.S.A. 44-510e(a) (Furse 2000) specifically limits permanent partial disability (PPD) to 415 weeks "not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto." That language means the 415 week limitation is only applied to PPD and only when a application for review and modification is filed pursuant to K.S.A. 44-528. Simply put, this Board Member finds no reason to diverge from *Cole* and *Jakob* and affirms the preliminary hearing order.

Respondent appeals two issues not raised before the ALJ: (1) can TTD be ordered with post-award medical benefits and (2) did the authorized treating physician base his opinions on an assessment of claimant's job duties with respondent? The Board has held that in appeals pursuant to K.S.A. 44-534a, issues not raised before the ALJ cannot be raised for the first time on appeal. To hold otherwise would place the Appeals Board in the position of attempting to decide an issue based upon an incomplete record and would deny claimant the benefit of evidence that may have been presented if he had been aware there was a dispute as to such issue at preliminary hearing.[12] Therefore, the Board will not consider the two aforementioned issues.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

1. For lack of jurisdiction, the Board dismisses respondent's appeal on the issue of whether is claimant entitled to TTD benefits more than 415 weeks after his accidental injury.

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[12] *Vanetta v. Southwest Manufacturing Company*, No. 216,635, 1996 WL 757386 (Kan. WCAB Dec. 19, 1996); see *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966).

[13] K.S.A. 44-534a.

2. The Board will not review the other two issues raised by respondent, because they were not raised before the ALJ.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that respondent's appeal is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this _____ day of October, 2015.

_____
HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Rebecca A. Sanders, Administrative Law Judge